

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No.: 05-11697GAO

MARILYN KUNELIUS

Plaintiff,

v.

TOWN OF STOW, separately, A  
PARTNERSHIP OF UNKNOWN NAME  
BETWEEN TOWN OF STOW and the TRUST  
FOR PUBLIC LAND, THE TRUST FOR  
PUBLIC LAND separately and CRAIG A.  
MACDONNELL, in his individual capacity

Defendants

**TOWN OF STOW'S OPPOSITION TO PLAINTIFF'S MOTION FOR  
SANCTIONS**

**I. INTRODUCTION**

The Plaintiff, Marilyn Kunelius, brought a complaint against the Town of Stow separately, "A Partnership of Unknown Name" between the Town of Stow and The Trust For Public Land, the Trust For Public Land separately, and Craig MacDonnell arising from a proposed sale of land in Stow, Massachusetts owned by Kunelius. Kunelius entered into a Purchase and Sale Agreement ("Agreement") with Cohousing Resources, LLC, a land developer in October 2002. Because Kunelius had previously elected to have the property value assessed under Chapter 61 of the Massachusetts General Laws as forest land resulting in tax savings to Kunelius, Kunelius was bound to offer the Town of Stow a right of first refusal to meet the bona fide offer. The Town voted to assign its statutory right of first refusal to the Trust for Public Land ("TPL"), a nonprofit

conservation organization, as provided under the terms of Chapter 61. TPL accepted that assignment and stepped into the shoes of the Buyer in the Agreement. The Town of Stow is not and was not a party to the Agreement once the assignment was made and accepted by TPL. Ultimately, TPL was unable to raise the money to complete the purchase of the property as intended and failed to close on the Property.

Kunelius received the only damages she is entitled to – the liquidated damages explicitly contracted for by the plain terms of the Agreement. Regardless of this clear contractual language, and regardless of the fact that the Town of Stow was not a party to the Agreement, Kunelius brought a complaint against the Town of Stow seeking specific performance of the Agreement and specifically alleges breach of contract, violations of Chapter 93A of the Massachusetts General Laws, intentional interference with a contractual relationship, violation of 42 U.S.C. §§ 1983, 1988, and fraud and misrepresentation. The Town of Stow, TPL, and Craig MacDonnell (the “Defendants”) jointly filed a Motion to Dismiss the Plaintiff’s Complaint, which Motion was denied. The Defendants then filed a Motion to Certify a Question of State Law to the Supreme Judicial Court seeking a determination as to whether the exercise of the right of first refusal under Chapter 61 of the Massachusetts General Laws leaves a liquidated damages provision in the Purchase and Sale Agreement intact and enforceable. This is the essential question in this case. The Court has not yet ruled on this Motion. In the interim, the parties have conducted discovery.

The Plaintiff now files a Motion for Sanctions pursuant to Federal Rules of Civil Procedure 11(c) alleging that the Defendants have “repeatedly made misrepresentations to the Court in order, among other things, to induce the court into considering a Certification of a bogus issue to the Supreme Judicial Court of Massachusetts.” The Plaintiff’s Motion and assertions made therein are reckless and scurrilous as no misrepresentations have been made by the Defendants or their counsel and discovery conducted to date has not “shockingly revealed” any such misrepresentations. The Plaintiff’s Motion is a thinly veiled attempt to distract the Court from the simple issue to be decided in this case, i.e. whether the liquidated damages received by the Plaintiff pursuant to the Agreement when TPL failed to close on the property is her sole remedy as a result of the failed deal which issue the Plaintiff characterizes as “bogus”. If the question is answered in favor of the Defendants and the only remedy available to the Plaintiff is the liquidated damages already received by her pursuant to the Agreement, then all claims against the Defendants must be dismissed. The Plaintiff’s attempt to distract the focus away from the substantive issues in this case and accuse the Defendants and their counsel of unethical behavior should be forcefully rejected.

The Town of Stow hereby requests that this Honorable Court deny the Plaintiff’s unjustified and unscrupulous Motion for Sanctions and award the Town of Stow attorneys fees and costs for having to defend against this Motion. The Town of Stow addresses the specific allegations made by the Plaintiff against them below and incorporates those arguments made by TPL in TPL’s Opposition to the Plaintiff’s Motion For Sanctions as if set forth herein.

## **II. PRODUCTION OF DOCUMENTS BY THE TOWN OF STOW**

As required under rule 26(a)(1) of the Federal Rules of Civil Procedure, the Town of Stow prepared its Automatic Disclosures and provided all of the documents identified in the Automatic Disclosures to the Plaintiff by letter dated November 21, 2006. The documents produced by the Town of Stow are all of the documents currently contained in the Town of Stow's files concerning the Kunelius property with the exception of several documents created after the Plaintiff filed her complaint against the Town of Stow that are subject to the attorney client privilege.<sup>1</sup>

In her Motion for Sanctions and supporting Memorandum of Law, the Plaintiff accuses the Town of Stow of failing to provide specific documents to her inferring that the Town of Stow actually had the documents being sought and that Town's failure to produce those documents was somehow done as part of a conspiracy with TPL and in bad faith to hide the documents from the Plaintiff. Specifically, the Plaintiff focuses on a draft of an application for a grant filed with the Commonwealth of Massachusetts Department of Housing Community Development ("MDHCD") that informs the MDHCD of a line of credit in the amount of \$6,000.000 available for use by TPL subject to TPL's internal approval process, including customary due diligence and approval by the Board of Directors. The Plaintiff accuses the Town of Stow of "failing to provide critically important attachments to the Application to the Commonwealth which demonstrates that the Defendants' representations to the Court regarding the

---

<sup>1</sup> While the Plaintiff did provide the Defendants with Automatic Disclosures, the Plaintiff did not provide the Defendants with the documents referenced in her Automatic Disclosures until March 5, 2007.

TPL's inability to purchase the Property have been deliberately false and misleading" and that the Town of "Stow failed to provide that letter or any documents relative to the Wainwright Bank." **Plaintiff's Motion at ¶4;** **Plaintiff's Memorandum of Law at p. 4, footnote 1.** What the Plaintiff totally omits from her Motion is that it was the Town of Stow who provided the Plaintiff with a copy of the application as part of the documents produced with the Town of Stow's Automatic Disclosure. The Plaintiff did not "discover" this application from another source and it would have been nonsensical for the Town of Stow to produce the bulk of the grant application that disclosed the line of credit that the Plaintiff seems to think is so critically important to her case and not the attachments referenced by the Plaintiff. The Town of Stow can only produce the documents currently in its possession and has produced all such documents to the Plaintiff. Rather than send a formal document request or attempt to conference this discovery dispute with the Town of Stow, the Plaintiff chose to file this wholly unsupported and irresponsible Motion for Sanctions against the Town and its attorneys.

### **III. LINE OF CREDIT<sup>2</sup>**

The Plaintiff appears to be asserting in her Motion for Sanctions that because the Town of Stow was aware of the line of credit available to TPL, the Town of Stow did something untoward by not asking TPL why TPL was not accessing the line of credit in order to close on the Kunelius property and by not insisting upon the use of the line of credit in order for "TPL to meet its

---

<sup>2</sup> The Town of Stow incorporates the arguments made by TPL concerning the availability of the line of credit to TPL and the Plaintiff's assertions that the availability of such a line of credit evidences the Defendants' misrepresentations to the Court as if incorporated herein and will only address here arguments specific to the Town of Stow.

obligations under the assignment". **Plaintiff's Memorandum at p. 17.** It is not clear why this argument is contained in a motion for sanctions or how it supports the Plaintiff's allegations that the Town of Stow made misrepresentations to the Court as the discovery to date supports the Defendants' assertions that TPL could not raise the funds (the fundraising did not materialize) in 2003 and the deal fell through. **Exhibit 1 – Deposition of Edwin R. Perry at pp. 89-101.** The concept that TPL needed to be able to raise the funds to pay back any loan made from a line of credit if accessed to close on the Kunelius property appears to be lost on the Plaintiff. Regardless, the Town of Stow had no standing to insist that TPL access its line of credit in order to close on the deal as the Town of Stow was not a party to the Agreement between TPL and Kunelius and was not obligated to insure that the closing occurred. The Town of Stow understood that once they assigned its right of first refusal to TPL, the Town was no longer part of the deal. **Exhibit 1 at pp. 84-85, 112, 135-145.**

The Plaintiff has repeatedly attempted to misconstrue a letter written by Town Counsel to Town Administrator William Wrigley during the period of time that both were advocating that the Town obtain an indemnification agreement from TPL should a lawsuit arise as a result of the assignment and / or TPL's failure to close on the purchase of the property. In the portion of a letter referenced by the Plaintiff in her Motion, Town Counsel opines that "[s]ince the language of c. 61 does not absolve the Town of any further liability to the landowner for failure of the assignee to carry out the obligations to purchase the land under the assignment, or for any other claims as may be made by the land owner (**such as exists in the present circumstances and are discussed below** (emphasis added)) appropriate terms and conditions of the assignment would

include an indemnification agreement by the assignee (TPL) to the assignor (the Town)". **Exhibit G attached to the Plaintiff's Memorandum.** Not only did the present circumstances referenced by Town Counsel in his letter not include TPL's failure to close on the deal, but the Town, including Ross Perry, understood the statement quoted to be commenting on the fact that the Town of Stow could still be sued regardless of the assignment and not to be opining as to whether any claims brought against the Town would have merit. In fact, further on in the letter, Town Counsel indicates that he is recommending an indemnification provision although "we may disagree with the seller's [Kunelius] contention.". **Exhibit 1 at pp. 143-145.** The Town of Stow did not insist on getting an indemnification agreement from TPL and Town Counsel (who is now deceased) turned out to be correct in that Kunelius did file a lawsuit against the Town of Stow, regardless of the Town of Stow's contention that Kunelius' claims have no merit and should be dismissed.

#### **IV. CONCLUSION**

The Town of Stow and its counsel have acted in good faith in the defense of the claims being made by the Plaintiff in her lawsuit and the Plaintiff's allegations to the contrary are wholly unsupported and have no place in this matter given the efforts made by the Town of Stow to produce the numerous documents contained in the Town's files and to produce former Selectmen for depositions noticed by the Plaintiff. The Town of Stow respectfully requests that the Plaintiff's Motion for Sanctions be denied and that the Plaintiff be ordered to pay attorneys fees' and costs to the Town of Stow for having to defend against this Motion.

Respectfully submitted,  
The Defendant,  
Town of Stow,  
By its attorneys,

/s/ Deborah I. Ecker

---

Leonard H. Kesten, BBO# 542042  
Deborah I. Ecker, BBO# 554623  
BRODY, HARDOON, PERKINS & KESTEN, LLP  
One Exeter Plaza  
Boston, MA 02116  
(617) 880-7100

DATED: March 21, 2007

# **EXHIBIT 1**

 COPY

Volume: I  
Pages: 1-279  
Exhibits: 20

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 05-11697-GAO

MARILYN KUNELIUS,  
Plaintiff,

v.

TOWN OF STOW, separately,  
A PARTNERSHIP OF UNKNOWN NAME  
BETWEEN TOWN OF STOW and THE  
TRUST FOR PUBLIC LAND, THE TRUST  
FOR PUBLIC LAND, separately,  
and CRAIG A. MACDONNELL, in  
his individual capacity,  
Defendants.

DEPOSITION of EDWARD R. PERRY, JR., a  
witness called by and on behalf of the Plaintiff,  
taken pursuant to Fed.R.Civ.P. 30, before Roberta  
J. Daniels, a Court Reporter and Notary Public  
within and for the Commonwealth of Massachusetts,  
at the Law Offices of Michael C. McLaughlin, One  
Beacon Street, Boston, Massachusetts 02108, on  
Monday, February 26, 2007, scheduled to commence  
at 10:00 A.M.

MELVIN LIPMAN COURT REPORTING  
101 Tremont Street, Suite 700  
Boston, Massachusetts 02108  
617-227-3985

1                   stepped into the purchase and sale agreement and would  
2                   follow the terms of that purchase and sale agreement.

3       Q   And had you ever done a Chapter 61 assignment prior to  
4                   this matter on the Kunelius property?

5       A   I think you asked me that, and I believe the town has  
6                   done them. I don't remember the timing, before or  
7                   after the Kunelius property.

8       Q   So, at some point, therefore, prior to the assignment,  
9                   is it fair to say that you specifically had  
10                  discussions with Mr. MacDonnell about the possibility  
11                  of TPL not being able to meet its obligations and go  
12                  forward with the purchase?

13      A   I think, in any of our discussions about the Kunelius  
14                  property, we always asked the what-if question, what  
15                  happens if we can't go forward.

16      Q   And in fact you received a letter from Jake Diemert by  
17                  way of -- strike that.

18                   Is it your testimony that once the  
19                  assignment occurred and it was accepted, that the  
20                  town was relieved of any and all obligations to  
21                  go forward or to ensure that the sale occurred?

22      A   It was my understanding that by signing this the town  
23                  was no longer involved in the P&S, other than in the  
24                  \$300,000 that we were looking for from the CPC funds.

1 Q Was there another \$100,000 beyond that?

2 A Initially, I think there was a proposal for 400,000,  
3 and that was turned down at town meeting, and then the  
4 deal was restructured for the three hundred thousand.

5 Q And where was the additional one hundred going to come  
6 from when the deal was restructured?

7 A The original deal was for 400,000, which I believe  
8 would have been CPC funds. It was restructured down  
9 to three hundred thousand.

10 Q When you say *restructured*, restructured between Craig  
11 MacDonnell and yourself?

12 A Restructured between TPL and the town.

13 Q And where was the additional \$100,000 going to come  
14 from when TPL was no longer going to receive \$400,000  
15 but, rather, three hundred thousand?

16 MS. FETOUH: Objection.

17 A I have a problem with you saying additional hundred  
18 thousand. So, I think the question is where was the  
19 shortage or the difference of \$100,000 coming from  
20 when they couldn't have the 400,000 from CPC funds,  
21 and that was from one of those four sources.

22 Q Well, do you recall me asking you questions about why  
23 the amount of the application went up from \$125,000 to  
24 352?

1 A I have not seen those documents, so I can't comment on  
2 that.

3 Q This is a document that was filed on behalf of the  
4 Trust for Public Land, Craig MacDonnell, and the Town  
5 of Stow, which has been filed with the Federal  
6 District Court, and on the first page at the bottom,  
7 last sentence, it says: However, after paying  
8 thousands of dollars in deposits required under the  
9 agreement, TPL found itself unable to raise the money  
10 necessary to fund the project and was unable to  
11 complete its purchase of the property. Do you see  
12 that?

13 A I don't.

14 MR. McLAUGHLIN: Okay. Did you give  
15 him this one here?

16 A Motion to dismiss?

17 Q Yes, all right, starting at the very last line,  
18 starting with however down at the bottom.

19 A Okay. I see it.

20 Q Now, it was your understanding that TPL had the money.  
21 I think that's what you testified to, correct?

22 MS. ECKER: Objection.

23 MS. FETOUH: Objection.

24 A It was my understanding they could make this project

1                   successful, yes.

2       Q     Did they have the money? I thought it was your  
3                   understanding that they had the money to go forward on  
4                   this project. Isn't that what you testified to?

5       A     They had funding and funding sources to make the  
6                   project go ahead.

7       Q     So, have you read this prior to today?

8                   MS. ECKER: I think he's testified he  
9                   has not seen this document.

10      A     You're talking about this document?

11      Q     Yes.

12      A     I don't believe I've seen it before today.

13      Q     Knowing what you know about the representations and  
14                   whatever due diligence you did concerning TPL, do you  
15                   know if that statement is accurate, that TPL found  
16                   itself unable to raise the money?

17                   MS. ECKER: Objection. I would ask  
18                   that he read the entire document, because that's  
19                   one statement taken out of context.

20                   MR. McLAUGHLIN: Okay. You can make  
21                   your objection, but I don't want instructions,  
22                   all right?

23                   MS. ECKER: He can answer, but, in  
24                   fairness, he should read the entire document and

1           not take one quip out of context. So, why don't  
2           you allow him to read the entire document.

3           MR. McLAUGHLIN: I'm not going to allow  
4           him to because we haven't got enough time. The  
5           issue that I have is concerning that one  
6           statement. That statement is not taken out of  
7           context. It's read exactly as has been written  
8           by perhaps you, madam.

9           Q     So, the question is: is today the first time that you  
10          have become aware that TPL has informed the court and  
11          that the Town of Stow has informed the court that TPL  
12          was unable to fund the purchase because it could not  
13          raise the money necessary to fund the project?

14           MS. ECKER: Objection.

15           A     This is the first time I've seen this document.

16           Q     And is today the first time you realized the Town of  
17          Stow and TPL and Mr. MacDonnell have told the federal  
18          court that they found themselves unable --

19           A     Your question is when was I aware that they told the  
20          federal court that they were unable to?

21           Q     Correct.

22           A     It is based upon this document that I just saw today.

23           Q     So, as far as you are aware, prior to today, is it  
24          true that you have no knowledge of TPL being unable to

1 raise the money necessary to fund the project.

2 MS. ECKER: Objection.

3 MR. CONROY: Objection.

4 MS. FETOUH: Objection.

5 MS. ECKER: Go ahead.

6 A That's an entirely different question. When we  
7 assigned the right to TPL, and then the funding  
8 apparently didn't materialize in '03 and the deal fell  
9 through, we were then aware that TPL did not have the  
10 funds to follow through with the deal.

11 Q You became aware that TPL did not have the line of  
12 credit?

13 MS. ECKER: Objection.

14 A I became aware that they did not have the funds to  
15 complete the deal.

16 Q Did you become aware that TPL did not have the line of  
17 credit of six million dollars?

18 A I was not aware that they did not have the line of  
19 credit.

20 Q So, when you say you became aware that they did not  
21 have the funds, did you or did you not know that they  
22 had a six million dollar line of credit?

23 A We would have been aware that they had a six million  
24 dollar line of credit.

1 Q And at some point, did you become aware that they had  
2 told you they did not have the funds necessary to go  
3 forward?

4 A I just said that, yes.

5 Q And what did you say to them with regard to the six  
6 million dollar line of credit when they told you they  
7 were unable to raise the money necessary to fund the  
8 project?

9 A I remember being very surprised that that happened  
10 because we thought we had covered those contingencies.

11 Q Well, did you ask them for proof of the six million  
12 dollar line of credit at that point?

13 A I don't recall that conversation.

14 Q Did you ask them what they meant by their access to  
15 capital markets?

16 A We didn't have that discussion at that point.

17 Q Did you take any steps to figure out whether TPL had  
18 liquid assets at that point necessary to purchase the  
19 property?

20 A I remember there were discussions with some of the  
21 people of the Friends from Red Acre that felt they  
22 should have had the funds and why didn't they have the  
23 funds.

24 Q And Friends of Red Acre asking TPL that they should

1 have had the funds?

2 A I don't know what they were saying to TPL. It was  
3 conversations I had with people from Red Acre saying,  
4 "This was not our understanding."

5 Q Now, Exhibit 3 refers to the fact that you were aware  
6 that there was over \$200,000 in donations already  
7 available to TPL, correct?

8 MS. FETOUH: Objection.

9 A It's in the grant application, yes.

10 Q Do you remember the terms of the purchase and sale  
11 agreement?

12 A Not specifically.

13 MR. McLAUGHLIN: Okay. We're going to  
14 mark that as Exhibit 5.

15 (WHEREUPON, Exhibit No. 5, purchase and  
16 sale agreement, marked for identification.)

17 Q I'd ask you to look at the second page of the purchase  
18 and sale agreement, and I'd ask you also -- I'm going  
19 to give you a piece of paper just so you can do a  
20 little calculation yourself, and I'll give you a pen  
21 to boot.

22 MS. ECKER: You're not going to have  
23 him doing math on the record.

24 MR. McLAUGHLIN: I think this MBA can

1                   probably handle the math that I'm going to ask  
2                   him to do.

3       Q   And if you want to decide not to, that's okay. You  
4                   can refuse. And we'll let the judge decide. But  
5                   looking at the purchase and sale agreement, I would  
6                   direct your attention to the second page under Item 7:  
7                   There is a four hundred thousand dollar promissory  
8                   note secured by a mortgage. Do you see that?

9       A   I do.

10      Q   So, that was money that was not necessary for the  
11                  closing of the deal because Mrs. Kunelius was willing  
12                  to take back a four hundred thousand dollar mortgage  
13                  on the property. Is that your understanding?

14      A   As intended with a developer such as Mosaic Commons,  
15                  that was the way I saw the deal being structured.

16      Q   As that was also available to TPL under the terms of  
17                  the purchase and sale agreement, wasn't it?

18      A   I'm not sure that it was.

19      Q   What made it not available to TPL?

20      A   Often we found in these purchase and sale agreements  
21                  under Chapter 61, they're designed to be used by a  
22                  developer. They don't necessarily fit the mold when a  
23                  town tries to exercise those rights.

24      Q   That's exactly right.

1 MS. ECKER: Objection.

2 MS. FETOUEH: Objection.

3 MR. CONROY: Objection.

4 MS. FETOUEH: You're testifying.

5 MR. McLAUGHLIN: Am I?

6 Q Did you make a determination that it was not available  
7 to TPL, that the \$400,000 was not available to TPL?

8 A I did not.

9 Q Mrs. Kunelius has never informed TPL that the \$400,000  
10 was not available. Were you aware of that?

11 MS. ECKER: Objection.

12 Q The four hundred thousand dollar mortgage was not  
13 available to them?

14 MS. ECKER: Objection.

15 A I'm not aware of conversations she might have had with  
16 TPL.

17 Q In addition to the \$400,000, there was over \$200,000  
18 that was available to TPL through donations, is that  
19 correct?

20 A That's what was in the grant application.

21 Q So, in addition to the money that was not needed at  
22 the closing, as far as Mrs. Kunelius was concerned,  
23 there's \$400,000, there's over 200,000, but we'll say  
24 \$200,000, from donations that TPL has informed you

1           they had in hand, they just wouldn't tell you from  
2           whom, and there's \$300,000 that was apparently going  
3           to be or was made available as a result of the vote.

4           Now, am I correct that that's \$800,000 that  
5           was available to effectuate the sale either from  
6           the second mortgage of Mrs. Kunelius or the  
7           donations received by TPL or the \$300,000 that  
8           had been earmarked by the town?

9           MS. ECKER: Objection.

10          A     My understanding was they needed to come up with a  
11           716,000 dollar payment, that that was the stumbling  
12           block.

13          Q     Do you have any knowledge that the \$400,000 was not  
14           available?

15          A     Which \$400,000?

16          Q     The mortgage from Mrs. Kunelius.

17          A     It was my recollection that wasn't available.

18          Q     And that's because some terms of a purchase and sale  
19           agreement that are between Mosaic Commons and  
20           Mrs. Kunelius are not applicable to the town. Is  
21           that your understanding?

22          A     It's my understanding that with 61 case issues like  
23           this it's difficult for the town to a hundred percent  
24           mirror the terms and that usually the town is required

1                   to come up with all the money up front.

2       Q   That's correct. And so if it's your understanding  
3                   that that's the case, is it also your understanding  
4                   that there are issues related to the applicability of  
5                   certain provisions of a purchase and sale agreement to  
6                   the town that would otherwise have been applicable to  
7                   the original buyer?

8       A   You lost me. Try that again.

9       Q   Well, for example, there's a feasibility study  
10                  referred to in the purchase and sale agreement. Are  
11                  you familiar with that?

12      A   Yup.

13      Q   Was the town required to undertake a feasibility  
14                  study?

15      A   The town had the option to do that.

16      Q   Was it required to?

17      A   I don't believe the town was required to do that.

18      Q   Because the town wasn't going to build a 40B. Is that  
19                  fair to say?

20      A   That's true.

21      Q   Now, given that you were aware that TPL already had in  
22                  excess of \$200,000 plus the line of credit plus the  
23                  \$300,000 from the town, what steps did you undertake  
24                  to ascertain why the difference was not available to

1                   TPL from its various sources of capital that you  
2                   referred to when you made the application to the  
3                   state?

4                   MS. ECKER: Objection.

5                   A      I believe there were conversations between the town  
6                   and TPL about what's going on and why can't we do  
7                   this.

8                   Q      And wasn't it in fact the case that TPL didn't want to  
9                   buy the property because they thought it was too  
10                  expensive and it wasn't worth the purchase price?

11                  MR. CONROY: Objection.

12                  MS. FETOUH: Objection.

13                  A      I can't comment as to why TPL wasn't able to go  
14                  forward with it, other than my understanding from them  
15                  that they didn't have the funding that we had thought  
16                  that they would have.

17                  Q      And they never explained to you what happened to the  
18                  line of credit and you never asked. Is that fair to  
19                  say?

20                  A      I don't recall those conversations.

21                  Q      Did you ask what was the status of the donations, the  
22                  200,000 plus, that you were aware of as of 3-30-03  
23                  when the application was signed? Did you ever ask  
24                  Craig MacDonnell what happened to that money?

1 A I think we had multiple discussions as to how to  
2 salvage the deal and to figure out what happened to  
3 the money and what other money could we get because we  
4 were trying to have a way to -- find a way to make the  
5 deal go through. So, we would have had discussions on  
6 what happened to this, what happened to that.

7 Q So, did you have a discussion as to what happened to  
8 the 200,000 plus?

9 A I believed we looked at it all to see what we could do  
10 to make it happen.

11 Q And what were the discussions as to what happened to  
12 the 200,000 plus?

13 A I don't recall those answers, other than the DHCP  
14 grant that we knew hadn't gone through.

15 Q But I'm talking about the \$200,000 plus. You don't  
16 recall any answers as to what happened to the money  
17 that had already been committed by certain not-for-  
18 profit corporations and private individuals?

19 A I don't recall that conversation.

20 Q Are you certain today, as you sit here, that you even  
21 asked about that?

22 A We had multiple discussions about what happened to the  
23 funding and how do we make this deal go forward.  
24 You're asking me if I asked specifically and got a

101

specific answer about the \$200,000, and I said I don't remember that.

3 Q Specifically, during those meetings as to where you  
4 could find money to make the deal work, do you recall  
5 specifically asking TPL or Craig MacDonnell why they  
6 weren't using the fallback plan of six million  
7 dollars?

8 A I don't remember a discussion on using the fallback  
9 plan.

10 Q But you told the state that none of the four  
11 components, A through D, were significant enough to  
12 prevent TPL from purchasing the property. Doesn't it  
13 seem to you odd that you would not have said, "Wait a  
14 minute. Where's the fallback position of six million  
15 dollars?" since you referred twice to --

16 A You're asking me to recall conversations --

17 MS. FETOUH: Objection.

18 MR. CONROY: Objection.

19 MS. ECKER: Objection. Now you can  
20 answer.

21 A You're asking me to recall conversations in  
22 specificity that are many years ago. I don't recall  
23 having those. I recall being extremely surprised and  
24 then disappointed that the project with TPL did not go

1 price, what made you think, if you did, that TPL  
2 could?

3 A Nothing made me think that they could or they  
4 couldn't. The town was no longer involved in that.  
5 It was between them, the proposed new buyer and the  
6 seller.

7 MR. McLAUGHLIN: Okay. Why don't we  
8 take a break and have lunch. How much time would  
9 be good?

10 MS. ECKER: 1:30, is that all right?

11 MS. FETOUH: Yes, okay.

12 MR. McLAUGHLIN: Okay, terrific.

13 (Luncheon recess, 12:53 P.M.)

14 (After recess, 1:40 P.M.)

15 (All parties present)

16 (WHEREUPON, Exhibit No. 8, Perry letter  
17 to Kachajian, dated September 24, 2003, marked  
18 for identification.)

19 MR. McLAUGHLIN: Just for the record,  
20 what we did is we marked the September 24<sup>th</sup>  
21 letter, which we'll refer to as Exhibit 8.

22 Q So, just for the record, the references in my  
23 questions to you, sir, concerning Exhibit 5 to the  
24 complaint, we've now marked that document as Exhibit 8

decision and usually that requires money to be expended, and that's the town meeting.

3 Q But in the absence of a decision by the town for  
4 money, is it fair to say that the actual elected body  
5 is the Board of Selectmen?

6 A Yes.

7 Q The town administrator does not have any authority,  
8 for example, to make the decision to go forward with  
9 the assignment. Is that fair to say?

10 A The board makes the decision.

11      0      Right.

12 (WHEREUPON, Exhibit No. 10. Diemert  
13 letter to Wrigley, dated February 10, 2003,  
14 marked for identification.)

15 Q This is a February 10, 2003, letter with a Bate stamp  
16 number of 428, KUN428, supplied to us by town counsel.  
17 It is a letter from Jacob C. Diemert, D-I-E-M-E-R-T,  
18 town counsel, to William J. Wrigley, town  
19 administrator, re Kunelius property purchase or  
20 assignment of the Chapter 61 rights, and it's dated  
21 February 10<sup>th</sup> which is approximately two days before  
22 the notice of assignment to Mrs. Kunelius as reflected  
23 on the February 12<sup>th</sup> letter from the Board of  
24 Selectmen to Mrs. Kunelius which is Exhibit 4.

1                   So, two days before the assignment takes  
2 place, apparently, Mr. Diemert tells the town  
3 administrator in Paragraph 2 that the language of  
4 Chapter 61 does not absolve the town of any  
5 further liability to the landowner for failure of  
6 the assignee to carry out the obligations to  
7 purchase the land under the assignment or for any  
8 other claims that may be made by the landowner  
9 such as exist in the present circumstances and as  
10 are discussed below. Appropriate terms and  
11 conditions for the assignment would include an  
12 indemnification by the assignee, TPL, to the  
13 assignor, the town, for any such claims as might  
14 be made by the landowner resulting from the  
15 assignment or its implementation and exercise by  
16 the assignee, TPL. I highly recommend such an  
17 indemnity clause be required for acceptance of  
18 the assignment of TPL in the present  
19 circumstances.

20                  Now, do you acknowledge that you received a  
21 copy of this February 10<sup>th</sup> letter?

22 A               We did.

23 Q               And would you also acknowledge that you received it  
24 prior to the date of the assignment?

1 A I don't remember specifically when we did that, but  
2 that's a safe bet.

3 Q Now, at some point, did you make an independent legal  
4 decision in which you or the board elected to  
5 disregard the advice of town counsel with regard to  
6 his opinion that the language of Chapter 61 does not  
7 absolve the town of any further liability?

8 MS. ECKER: Objection. One, I note you  
9 didn't complete the paragraph of what this says  
10 and let him read the entire letter, but, second,  
11 there are other documents that go along with this  
12 that had discussions regarding this issue after  
13 the letter. So, the basis for my objection is  
14 you're assuming facts that aren't established.

15 Q Let's look at the second page so we can clear this up.

16 MS. ECKER: And the other documents  
17 that went along with this. You're assuming that  
18 this was the town counsel's advice, and you're  
19 pulling one sentence out of context in this  
20 letter.

21 MR. McLAUGHLIN: Actually, madam, I  
22 didn't mean to. I think I read the entire  
23 Paragraph 2.

24 MS. ECKER: Such as exist in the

1 present circumstances discussed below, and  
2 discussed below in Paragraph 3 are two  
3 circumstances which are the subject of other  
4 documentation that the town has provided.

5 Q So, is there any reference in this letter, sir, to any  
6 attachments included with this letter on the second  
7 page?

8 MS. ECKER: Not attachments,  
9 discussions with town counsel after the fact.

10 MR. McLAUGHLIN: And while I appreciate  
11 your observations, madam, with the highest  
12 respect, I didn't ask you that question. I asked  
13 it of your client.

14 MS. ECKER: The only thing I'm  
15 objecting to is your characterization of what  
16 town counsel concluded. You can ask him what he  
17 meant by this, what he thought.

18 MR. McLAUGHLIN: The document speaks  
19 for itself.

20 MS. ECKER: And it's not in and of  
21 itself, but go ahead.

22 MR. McLAUGHLIN: I'm not trying to  
23 misrepresent the contents of this. I simply  
24 asked about Paragraph 2. We'll get to the rest

1                   of it.

2       Q    So, my question, I will restate. Did you elect as the  
3                   chairman of the Board of Selectmen to disregard the  
4                   advice of the town counsel with regard to whether or  
5                   not Chapter 61 absolved the town of further liability  
6                   once an assignment is made?

7                   MS. ECKER: Objection. That's not what  
8                   the town counsel said, but you can answer.

9       Q    Okay. Let's read it again. I'll take as much time as  
10                  it takes. Let's look at the first sentence, quote:  
11                  Since the language of Chapter 61 does not absolve the  
12                  town of any further liability to the landowner for  
13                  failure of the assignee to carry out the obligations  
14                  to purchase the land under the assignment or for any  
15                  other claims as may be made by the landowner,  
16                  parenthesis, such as exist in the present  
17                  circumstances and are discussed below, close  
18                  parenthesis, comma, appropriate terms and conditions  
19                  for the assignment would include an indemnification  
20                  agreement by the assignee, TPL, to the assignor, the  
21                  town, from any such claims as might be made by the  
22                  landowner resulting from the assignment or its  
23                  implementation and exercise by the assignee, TPL. I  
24                  highly recommend that such an indemnity clause be

1 required for acceptance of the assignment of TPL in  
2 the present circumstances, period.

3 MS. ECKER: Paragraph 3.

4 MR. McLAUGHLIN: I'm sorry. I'm  
5 reading one --

6 MS. ECKER: These circumstances  
7 include.

8 MR. McLAUGHLIN: I understand. I'm  
9 asking about -- you implied that I read one  
10 sentence, madam. No, you didn't imply. You said  
11 I read one sentence. So, I've now gone and read  
12 it again, because I didn't read one sentence. I  
13 read the entire paragraph. This is my  
14 deposition. I will get to Paragraph 3 should I  
15 so elect. You can object to form.

16 MS. ECKER: All right. My objection is  
17 that, in your question, you're stating town  
18 counsel concluded and did they abrogate his  
19 conclusion. My objection is you are saying that  
20 town counsel concluded.

21 MR. McLAUGHLIN: I think, at this  
22 point --

23 MS. ECKER: He can answer whatever he  
24 understood this paragraph to mean at the time.

1                   MR. McLAUGHLIN: I'm going to suggest  
2                   that that objection violates Massachusetts Rules  
3                   of Civil Procedure in that you have now given him  
4                   the answer that you would like him to say. I am  
5                   going to object, and I am going to not waive my  
6                   right to bring this up in front of the judge,  
7                   because you're not supposed to be able to do  
8                   that, madam.

9                   So, you can object all you want, but that is  
10                  nothing short of an instruction. I'm moving  
11                  forward without waiving my right.

12                  MS. ECKER: I'm just going to say my  
13                  witness certainly needs no instruction from me.  
14                  He's a very competent --

15                  MR. McLAUGHLIN: Okay. Then all you  
16                  have to do is object.

17                  MS. ECKER: He can answer as he sees  
18                  fit.

19                  MR. McLAUGHLIN: All right. But I  
20                  think what you've done is violating the rules.

21                  MS. ECKER: I disagree with you.

22                  THE WITNESS: Can you summarize your  
23                  question?

24                  Q     Did you make any independent decision to determine

whether or not town counsel's statement that the language of Chapter 61 does not absolve the town of any further liability was incorrect?

4 A We did not have a discussion on whether his statement  
5 was correct or incorrect.

6 Q Now, you testified earlier today that you believed  
7 that the town's obligations ended with the assignment.

8 A That's true.

9 Q You would agree with me, wouldn't you sir, that  
10 Paragraph 2 suggests that town counsel did not  
11 necessarily believe that the town's obligations were  
12 absolved simply by assigning the right of first  
13 refusal?

14 A I would not.

MS. ECKER: Objection.

16 Q What's the basis for your answer?

17 A Town counsel was advising us that we were still  
18 subject to being sued if something didn't happen and  
19 that we should be indemnified in case that happened.  
20 I'm sure he's enjoying today in saying, "I told you  
21 so." As it turns out, this was not a case of a  
22 partnership with a deal. It was if something happens  
23 and we're sued, the town could be named, and I think  
24 he was asking for us to be protected in case that

1                   happened.

2       Q    Well, he does suggest that Chapter 61 doe not absolve  
3                   a town of liability to a landowner when there's a  
4                   failure by the landowner to perform, failure by the  
5                   assignee to perform. Doesn't he suggest that to you?

6       A    He was saying that we could be sued by the landowner.

7       Q    So, and for the failure of the assignee.

8       A    I interpret that as we could be sued by anything, any  
9                   reason the property owner wanted to, and, as it  
10                  proves, that was the case. Town gets sued for a  
11                  number of things. We win more than we lose.

12      Q    So, from your point of view, it's your testimony that  
13                  the specific language, quote: Since the language of  
14                  Chapter 61 does not absolve the town of any further  
15                  liability -- I'll stop right there. As far as you're  
16                  concerned, that simply meant that anybody at any time  
17                  could sue the town for any reason, period. That's how  
18                  you viewed that?

19      A    Yes.

20      Q    And so you didn't consider whether or not the mere  
21                  assignment by itself absolved liability of the town,  
22                  the assignor. You never considered whether that, just  
23                  by assigning it, you were out completely.

24      A    We believed that by assigning the right of first

1                   refusal the town was no longer part of the deal.

2       Q   Even though you read this language?

3       A   It's true.

4       Q   And so did you undertake any analysis as to what  
5                   Chapter 61 says with regard to the obligation of the  
6                   assignor at the time, what obligations continued after  
7                   the assignment?

8       A   I don't think there was any further evaluation, other  
9                   than the review by town counsel as written here.

10      Q   So, there was no other lawyer involved, is that  
11                   correct?

12      A   I believe that's true.

13      Q   Now, under Paragraph 3, Paragraph 3 says: These  
14                   circumstances include two potential sources of  
15                   litigation and possible damage claims by the seller,  
16                   Kunelius, who provided the Chapter 61 notice to the  
17                   town in the present matter, period.

18                   First, the seller through his attorney is  
19                   saying that no Chapter 61 notice was required for  
20                   the proposed sale because use of the Chapter 61  
21                   land was not being sold or converted to a use  
22                   other than forest land. Second, the seller is  
23                   saying that compliance with the terms of the  
24                   purchase and sale agreement, which was attached

1 to the Chapter 61 notice, include not only  
2 monetary compensation but a tax benefit to the  
3 seller, all of which together constitute the  
4 benefit of the bargain with the intended buyer.

5 Now, earlier you had testified that you  
6 believed Mr. Kachajian had notified you that  
7 there was a possibility that Mrs. Kunelius was  
8 going to be looking for a tax benefit as a result  
9 of the sale. In fact, it was town counsel who  
10 notified you of that first, wasn't it?

11 A Apparently so. You know, the next paragraph says:  
12 While we may disagree with seller's contention.

13 Q I understand. I'm going to get to --

14 A So, the fact that he says something doesn't  
15 necessarily mean we should believe that.

16 Q I understand. When you became aware that  
17 Mrs. Kunelius was looking for a tax benefit for  
18 the assignment of the property, did it occur to  
19 you to determine what kind of credit she could  
20 get for the assignment of the property?

21 A I believe we looked into that and were not able to  
22 determine a value nor able to determine her own  
23 personal tax situation and, therefore, we couldn't  
24 determine a value.